



## Hewitsons' Employment LEGAL UPDATE

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### **Age Discrimination**

In the case of *Gorka Salaberria Sorondo v Academia Vasca de Policia y Emergencias* the European Court of Justice (ECJ) considered the legality of an age limit imposed by the Basque Police and Emergency Services Academy (the Academy) in Spain for the recruitment of state police officers in light of the EU Equal Treatment Framework Directive (the Directive).

Mr Salaberria Sorondo claimed in the High Court of Justice of the Basque Country (the Basque High Court) against the requirements of the Academy which included only recruiting those aged 18-35 years. Being over 35, Mr Salaberria Sorondo claimed that there was no justification for this specific age range, the age requirements were contrary to the Directive and therefore unlawful age discrimination. The Basque High Court stayed proceedings and requested a preliminary ruling by the ECJ on whether imposing an upper age limit was compatible with the Directive.

In this case the Academy set out the duties of the role under scrutiny, including the use of force and enforcement measures in maintaining public order. Evidence was submitted that from the age of 40 the operational capacity of police officers in the role declined. At the age of 55 officers were no longer considered capable of performing the role, being a risk to themselves and third parties. At the age of 56 they qualified for modified roles including a reduction in hours and the removal of certain duties such as night work. In some cases officers qualified for voluntary retirement at the age of 59.

The ECJ held that the restrictive recruitment policy of the Academy could be objectively justified and did not go beyond what is necessary to achieve that objective. The demands of the role required recruits to be at their physical peak and, following a two year training period, carry out the role for a significant length of time. Added to this, the Academy needed to plan for the future. Due to an ageing police force, it was key for the Academy to recruit younger candidates who could take on the burdens of the more physically demanding operational roles and balance those of older officers who would undertake either reduced operational capacities or move to more administrative positions.

The ECJ referred the case back to the Basque High Court noting that if the referring court considered that the facts provided were accurate, the recruitment criteria could be objectively justified and did not go beyond what was necessary to achieve the objective.

## **Vicarious Liability**

In the case of *Bellman v Northampton Recruitment Limited* the High Court (HC) considered whether an employer was vicariously liable for a Managing Director's violent assault on an employee following a Christmas party.

Mr Bellman worked for Northampton Recruitment Limited (the Company) as a Sales Manager. In 2011 the office Christmas party took place at a golf club. After the party some guests, including Mr Major, the Managing Director, and Mr Bellman decided to continue drinking at the hotel where some of them were staying. The Company paid for some of the drinks. During the conversation a controversial work topic arose and Mr Major lost his temper which, on challenge by Mr Bellman, resulted in Mr Major punching him in the face twice, fracturing Mr Bellman's skull and causing him severe brain damage. Mr Bellman brought a claim for damages against the Company only, on the basis that it was vicariously liable for the Mr Major's conduct and covered by insurance whereas Mr Major was unlikely to have the means to pay.

The HC dismissed the claim and held that the Company was not vicariously liable for the assault. Key in the HC's decision was the finding that the parties had gone for an "impromptu drink", it was not part of the Christmas party and therefore unplanned. The HC held that just because the fight followed a discussion of work matters did not mean that it was "in the course of employment".

## **What To Look Out For**

### **Reform of the Employment Tribunal System**

A consultation, *Reforming the Employment Tribunal System*, has been launched by two government departments to discuss proposals for reform and modernisation of the Employment Tribunal (ET) and Employment Appeal Tribunal services.

Proposed reforms include:

- Digitisation of the claims process - whilst currently 90% of claims are now lodged through the online service, following the initial filing claims are then dealt with by paper. The consultation suggests that some claims, such as straightforward wage claims, could be decided by online decisions. However it was noted that this would not be appropriate for more complicated claims, such as discrimination claims.
- Delegation of routine tasks to case workers - currently ET case workers have a level of responsibility over matters such as the timeliness of applications/appeals and whether parties are permitted to amend documents. It is believed that allowing administrative staff to decide on more routine and administrative decisions would free up judges to concentrate on issues that require legal expertise and speed up resolution of cases.
- Tailoring ET panels to the needs of the case - the use of non-legal members as a matter of course is not considered appropriate and the consultation suggests

deploying non-legal members where the needs of the case require it and their expertise is relevant to the outcome.

## **Draft Gender Pay Reporting Regulations**

The Government has this month published a revised version of new Regulations under the Equality Act 2010 which aim to make transparent the difference in the average pay between male and female employees for businesses with over 250 employees.

The revised legislation has dealt with concerns aired about the original draft Regulations published in February 2016. The main revisions include:

- Moving the 'snapshot date' (i.e. the point when employers are considered to be over the threshold of 250 and required to collect data) to 5 April (from 30 April as originally suggested) each year.
- Whilst the legislation will cover both workers and employees, the Government has allowed for exceptions where employers do not have the relevant data of workers, addressing problems of collecting information about those not in a normal payroll system.
- To prevent skewed data as a result of employees on maternity, sick leave or other instances during the calculation period, average pay will be based solely on those on full pay. Bonuses paid annually will be added proportionately to the relevant period but will be applicable to all employees (not just those on full pay).
- Whilst there is no express enforcement mechanism, failure to comply with the Regulations will constitute an unlawful act under the Equality Act 2006, entitling the Equality & Human Rights Commission to take enforcement action.

Subject to obtaining parliamentary approval, the Regulations will come into force on 6 April 2017.

For more information on the information shared in this update please contact Nicholas Hall on 01604 463375 or email Nick at [nicholashall@hewitsons.com](mailto:nicholashall@hewitsons.com)

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